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Objection Deadline: May 3, 2019 at 11:30 a.m.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re: : **Chapter 11**
: **SEARS HOLDING CORPORATION, et al.,** : **Case No. 18-23538 (RDD)**
: **Debtors.¹** : **Jointly Administered**
:
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**5330 CROSSWIND, LLC'S SUPPLEMENTAL OBJECTION AND RESERVATION OF
RIGHTS TO THE NOTICE OF ASSUMPTION AND ASSIGNMENT OF ADDITIONAL
DESIGNATABLE LEASES [DOCKET NO. 3298]**

5330 Crosswind, LLC ("Crosswind") submits the following supplemental objection and reservation of rights (the "Objection") to the Notice of Assumption and Assignment of

¹ The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovol Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); Sears, Roebuck de Puerto Rico, Inc. (3626); SYW Relay LLC (1870); Wally Labs LLC (None); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

Additional Designatable Leases (Doc. 3298, the “Notice”) filed by Transform Holdco LLC (the “Buyer”) on April 19, 2019:

BACKGROUND

1. Crosswind is the lessor of approximately 1,014,513 square feet of warehouse space situated on three parcels of real property located in Columbus, Ohio pursuant to a Warehouse Lease dated October 25, 1988, as amended (the “Lease”), originally between Leadership Southwest, Inc., Crosswind’s predecessor-in-interest, and debtor Sears, Roebuck, and Co. (“Sears”). Debtor Innovel Solutions, Inc. (“Innovel”), a successor-in-interest to Sears, is the current tenant under the Lease (Sears and Innovel are collectively referred to herein as the “Debtors”). Pursuant to the terms of the Lease, as amended, Debtors Sears and Innovel are co-obligors on all amounts due under the Lease. The Lease is not attached because it contains sensitive information and the Debtors already have a copy.

2. On January 23, 2019, Debtors file their Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction (Doc. 1774, the “Supplemental Cure Notice”). In it, the Debtors indicated that they may assume and assign the Lease.

3. On January 31, 2019, Crosswind filed its Limited Objection of 5330 Crosswind, LLC to Supplemental Cure Notice and Reservation of Rights (Doc. 2223, the “Cure Objection”). The Cure Objection stated that, as of the date of its filing, the amount needed to cure defaults under the Lease totaled approximately \$142,751.00. Further, as of that date, approximately \$408,986.18 in tax obligations had accrued and would soon become due and payable. And finally, the Cure Objection reserved Crosswind’s right to seek adequate assurance of future performance by any assignee under the Lease.

4. The Notice indicates that Buyer has designated the Lease for assumption and assignment pursuant to the terms of the Court's February 8, 2019 Order (I) Approving the Asset Purchase Agreement Among Sellers and Buyer, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances, (III) Authorizing the Assumption and Assignment of Certain Executory Contracts and Leases in Connection Therewith, and (IV) Granting Related Relief (Doc. No. 2507, the "Sale Order") and the Court's April 2, 2019 Order (i) Authorizing Assumption and Assignment of Certain Executory Contracts and Leases and (ii) Granting Related Relief (Doc. No. 3008, the "Assumption and Assignment Order").

SUPPLEMENTAL OBJECTION

5. The Notice indicates that the Debtors believe there are no amounts to be cured. Crosswind hereby renews the arguments made in the Cure Objection, as updated below. In short, the total estimated cure amount as of April 30, 2019 is \$191,936.03, as summarized on the chart attached hereto as Exhibit 1. In addition, Crosswind seeks adequate assurance information related to the proposed assignee—Transform Innoval Properties, LLC.

A. Monetary Items.

6. In order to assume and assign the Lease, the Debtors must cure or provide adequate assurance of prompt cure of any default. 11 U.S.C. § 365(b)(1)(A). Further, the Debtors must provide adequate assurance of future performance of the remaining obligations under the Lease. 11 U.S.C. § 365(b)(1)(C). The Debtors' proposed assumption and assignment fails the cure requirement in four respects. A chart summarizing the following items is attached hereto as Exhibit 1.

7. First, the Lease requires the Debtors to make monthly base rent payments to Crosswind. As of the filing of this Objection, the Debtors are current on base rent through April

2019. Crosswind hereby reserves the right to include any amount of base rent that becomes due and is not timely paid in the cure amount.

8. Second, the Lease requires the Debtors to pay ongoing real estate taxes for the property as they become due. Property taxes in Ohio are paid in arrears. In January 2019, Debtors paid real estate taxes for the first half of 2018 for two of the three parcels. Crosswind paid real estate taxes in the amount of \$5,892.42 on the third parcel for the first half of 2018. Pursuant to the terms of the Lease, the Debtors are obligated to reimburse Crosswind for this payment. The required cure amount should include the \$5,892.42.

9. Real estate taxes for the second half of 2018 will become due in June 2019. The estimated amounts due in June 2019 (for the second half of 2018) and January 2020 (for the first half of 2019) are set forth on Exhibit 1. Crosswind is entitled to receive adequate assurance that future real estate taxes will be paid.

10. Third, pursuant to the terms of the Lease, the Debtors must pay certain ongoing expenses related to the property (the “CAM Expenses”). The Debtors are currently in default of their obligations for calendar years 2018 and 2019. The Debtors owe actual CAM Expenses for July through December 2018 totaling \$95,745.48. These amounts have not been paid and should be included in any cure amount. Attached hereto as Exhibit 2 are copies of the invoices for the 2018 CAM charges (the invoice for October to December 2018 includes the real estate tax reimbursement obligation of \$5,892.42 described in paragraph 8 above).

11. The currently known CAM Expenses for the period January 1, 2019 through April 30, 2019 total \$51,192.32. A copy of the invoice for those items is attached hereto as Exhibit 3. Crosswind reserves the right to include any additional CAM expense items which have not yet processed through. The Debtors have failed to pay any amount for 2019. The required cure

amount should include the sum of \$51,192.32, along with any additional sums that may become due before the Lease is assumed and assigned.

12. Finally, Crosswind has incurred significant attorneys' fees in connection with protecting its interests in these cases. Attorneys' fees and costs incurred in enforcement of the obligations of a lease are also proper components of a cure claim. *See In re Entertainment, Inc.*, 223 B.R. 141, 152 (Bankr. N. D. Ill. 1998). *See also Urban Retail Properties v. Loews Cineplex Entertainment Corp.*, 2002 WL 5355479 (S.D.N.Y. Apr. 9, 2002); *In re Westview 74th Street Drug Corp.*, 59 B.R. 747, 756-57 (Bankr. S.D.N.Y. 1986). The Supreme Court has upheld the enforceability of attorneys' fees clauses, ruling that pre-petition attorneys' fees clauses were enforceable with respect to issues peculiar to bankruptcy law. *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric*, 127 S. Ct. 1199, 1206 (2007). As of April 30, 2019, Crosswind has incurred approximately \$34,105.81 in attorneys' fees and costs in enforcement of the Debtors' obligations under the Lease, and estimates an additional \$5,000 going forward. The required cure amount should include all such fees.

B. Adequate Assurance Information on the Proposed Assignee.

13. Prior to the filing of the Notice, the Debtors had provided Crosswind with cursory information related to the Buyer's financial ability to perform the terms of the Lease. The Buyer has now designated a third party, Transform Innoval Properties LLC (the "Proposed Assignee"), as the assignee of the Lease. Crosswind has received no information regarding the financial wherewithal of the Proposed Assignee to perform the terms of the Lease. Crosswind is entitled to adequate assurance that the Proposed Assignee can perform all future obligations under the Lease, including payment of the tax obligations due in the near future listed on Exhibit 1. Pending receipt and review of information related to the Proposed Assignee, Crosswind objects to the assumption and assignment of the lease to the Proposed Assignee.

CONCLUSION

WHEREFORE, Crosswind respectfully objects to the assumption and assignment of the Lease to the Proposed Assignee unless the cure amount (currently \$191,936.03) is paid in full at the time of the assignment and appropriate adequate assurance information concerning Transform Innovel Properties, LLC is provided to Crosswind. Crosswind further reserves its rights to include additional sums in the cure amount as they become known.

Dated: May 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 3, 2019, a true and correct copy of the foregoing *5330 CROSSWIND, LLC'S SUPPLEMENTAL OBJECTION AND RESERVATION OF RIGHTS TO THE NOTICE OF ASSUMPTION AND ASSIGNMENT OF ADDITIONAL DESIGNATABLE LEASES* was filed with the Court's CM/ECF system and served on all parties registered to receive such service, and was served on the parties listed below as indicated:

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